Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

BOBBY WAYNE SWISHER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Were Petitioner's rights under the Fourth and Fourteenth Amendments violated when Petitioner's consent to search occurred while Petitioner was in custody at the police station and had not given a "knowing and intelligent" waiver of his Fourth Amendment rights?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bobby Wayne Swisher respectfully petitions the Court for a writ of certiorari to review the decision of the Virginia Supreme Court.

OPINIONS BELOW

The Virginia Supreme Court's opinion affirming the conviction and sentence of Petitioner is reported at 506 S.E.2d 763 (Va. 1998) (App. A).[1] The Virginia Supreme Court's denial of Petitioner's motion for rehearing is unreported (App. B). The district court's oral decisions in response to Petitioner's suppression motions are unreported (App. C).

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[1] "App." refers to the Appendices to this Petition.

JURISDICTION

On October 30, 1997, a jury in the Circuit Court for Augusta County, Virginia convicted Petitioner of capital murder and related charges. Petitioner was sentenced to death on the capital murder conviction. The Virginia Supreme Court's opinion affirming Petitioner's conviction of capital murder and sentence of death was entered on November 6, 1998 (App. A). The Virginia Supreme Court denied the petition for rehearing on January 8, 1999 (App. B). On March 9, 1999, this Court granted an extension of time for Petitioner to file this petition for a writ of certiorari until May 7, 1999 (App. D).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment of the U.S. Constitution, which provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

and the Fourteenth Amendment of the U.S. Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

A. Statement Of Facts[2]

On February 21, 1997, Dawn Snyder's body was found in a field in Stuarts Draft, Virginia (J.A. 906-07). On

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[2] The facts set forth in this section are taken from the Joint Appendix ("J.A.") filed with the Virginia Supreme Court.

February 22, two young men alleged that Petitioner, then twenty years old, had admitted to killing Ms. Snyder (J.A. 1009). At approximately 9:00 p.m. the next day, four police officers from the Augusta County Sheriff's Department went to Petition's home to question him (J.A. 411, 520).

Petitioner had been drinking alcohol all day long and had passed out in his bed (J.A. 491). At 9:15 p.m., the officers roused Petitioner from his bed by yelling his name (J.A. 486). Two officers came in through the front door to Petitioner's room, while two others came in through the back entry (J.A. 412, 520). The deputies testified that they asked Petitioner to accompany them back to the station house (J.A. 522). The deputies then handcuffed Petitioner's hands behind his back while they were in the bedroom, and led him to the patrol car (J.A. 416, 522). The officers claimed that they informed Petitioner that he was not under arrest and that the handcuffs were necessary as a "precautionary measure" (J.A. 412).

One of the officers noticed Petitioner's coat lying on a piece of furniture, and suggested that Petitioner take the jacket with him because it was cool outside (J.A. 455-56). The officer then handed Petitioner his jacket so he could wear it to the police station (J.A. 456).

Upon reaching the police station at approximately 10:15 p.m., Petitioner was taken to a small conference room and questioned by three police officers (J.A. 418). This interrogation lasted almost two hours or until shortly after midnight (J.A. 420). Petitioner was not informed of his *Miranda* rights throughout this two-hour interrogation (J.A. 420).

At one point during the questioning, Petitioner's mother called into the station (J.A. 414). Petitioner asked to speak with her, but was told he had to wait until the

officers finished their interrogation (J.A. 414). One investigator testified that he warned Petitioner, "I said, once we are finished, you will be allowed to call your mother" (J.A. 421). Petitioner attempted at one point to leave but at least one officer blocked his path (J.A. 493).[3]

During the interrogation, officers told Petitioner that they "wanted to test his coat to see if [they] could determine whether there was any blood on it or not" (J.A. 456). The officers testified that Petitioner replied "go ahead,"[4] and that Petitioner stated he did not "know anything about what [they were] talking about" (J.A. 456). Forty-five minutes to an hour after Petitioner arrived at the police station, a Luminol[5] test was performed on his jacket (J.A. 499, 456). The police then told Petitioner that there was a "positive reaction," and that they were going to take possession of the coat and send it to the forensics laboratory for further testing (J.A. 456-57, 499). The officers testified that, in response, Petitioner said "he really didn't care, [the police] could take it" (J.A. 525).

At the same time the Luminol test was being performed on the jacket, the officers continued to question Petitioner and to confront him with other pieces of evidence. They presented him with burned clothes and a pair of new tennis shoes that they obtained from a contemporaneous search of his home (J.A. 524). They photographed bruises and scratches on his body (J.A. 464). Finally, he was confronted with the two witnesses to whom he

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[3] One of the police officers testified that no one blocked Petitioner from leaving the room (J.A. 498).

[4] Petitioner denies that he was asked for consent to test his jacket (J.A. 490-91).

[5] Luminol is a chemical that is used to test for bloodstains (J.A. 1032).

had allegedly confessed the day before (J.A. 526, 1004-05).

Police arrested Petitioner shortly after the confrontation with the two witnesses, at about 12:05 a.m., Monday, February 24 (J.A. 526). He was finally given *Miranda* warnings after his arrest, almost two hours after arriving at the police station (J.A. 414-15). At approximately 2:00 a.m., Petitioner was finger-printed and put in a jail cell (J.A. 440).

B. Constitutional Issues Raised

Prior to trial, Petitioner made a motion to suppress evidence against him, which included evidence related to the jacket and the bloodstains on the jacket, arguing that the evidence was obtained in violation of the Fourth and Fourteenth Amendments (App. E). The trial court denied the motion, finding that Petitioner consented to any searches that took place (App. C at 26a-27a). In so holding, the court found that the question of whether Petitioner was in custody from the time he was taken from his uncles' house to the time police administered *Miranda* warnings was not "significant at this point because there had been no statements taken from him in that interim . . ." (App. C at 27a). Earlier, the court similarly noted that whether Petitioner was in custody was "not an issue in this case because . . . no evidence was obtained during this period of time . . ." (App. C at 24a).

On appeal to the Virginia Supreme Court, Petitioner argued that the trial court erred in failing to suppress evidence against him because it was obtained in violation of the Fourth and Fourteenth Amendments (App. F at 34a-35a). The Virginia Supreme Court rejected Petitioner's contention, ruling that the evidence in the record supported the trial court's ruling that Petitioner's consent to any police searches was voluntary (App. A at 13a-14a).

REASONS FOR GRANTING THE WRIT

This case presents an important and timely question regarding the scope of protection afforded citizens under the Fourth and Fourteenth Amendments.

I. A "KNOWING AND INTELLIGENT WAIVER" STANDARD SHOULD BE APPLIED TO DETERMINE WHETHER CONSENT GIVEN BY AN INDIVIDUAL IN CUSTODY AT A POLICE STATION IS VOLUNTARY

There is no dispute that Petitioner was handcuffed, brought to the police station and questioned for over two hours by three police officers without *Miranda* warnings, and that key evidence in this case—his jacket and bloodstains on the jacket—was obtained from Petitioner during this period (J.A. 455-56). Further, there is no evidence that Petitioner was informed that he could refuse consent or otherwise knew of this right when the police officers told him they were going to test, and later seize, his jacket (J.A. 456, 525).

Accordingly, this case squarely presents an important Fourth Amendment question that has never been addressed by this Court: whether consent to search can be voluntary when such consent is given by an individual, in custody at a police station, who has not given a "knowing and intelligent" waiver of his Fourth Amendment rights. This Court should grant Petitioner's writ of certiorari to review this important question of federal law.

A. *Schneckloth* And *Watson* Left Open This Important Question Of Federal Law

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated . . . ." U.S. Const. amend. IV.[6] The Fourth Amendment thus functions "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Based upon these guarantees, this Court has ruled that, subject to a few specifically established and well-drawn exceptions, physical evidence shall not be taken from a person or a person's home without a justifiable search warrant issued upon probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Watson*, 423 U.S. 411, 427 (1976) ("There is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances.") (J. Powell, concurring opinion) (citing and quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

Pursuant to one of the few established exceptions to the warrant requirement, the state may conduct a warrantless search with the consent of the suspect. *Davis v. United States*, 328 U.S. 582 (1946). In particular, this Court has stated that "a search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth*, 412 U.S. at 222; *see also Katz v. United States*, 389 U.S. 347, 358 (1967); *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970). In order for such a search to be valid, however, the state must show, by a preponderance of the evidence and through "clear and positive testimony," that consent was "freely and voluntarily given" and was not "the product of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 222, 226; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

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[6] The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The *Schneckloth* Court discussed circumstances under which consent could be considered voluntary. *Schneckloth*, 412 U.S. at 226. The Court concluded that, when consent to search is obtained during the course of a routine traffic stop on a public highway, the suspect's knowledge of the right to refuse consent was *not* a prerequisite to establishing voluntary consent. *Id.* at 227. The Court acknowledged that the "on-the-scene" questioning in *Schneckloth* was "far removed" from the more troubling circumstances in which consent to search was purportedly obtained "after [a suspect] has been placed in custody," as Petitioner was in this case.[7] *Id.* at 232, 240 n.29. In these circumstances, the Court noted, lower courts have been "particularly sensitive to the heightened possibilities for coercion." *Id.* at 240 n.29. The Court further distinguished the circumstances of the *Schneckloth* case from the in-custody interrogation present in our case as follows:

> Consent searches . . . normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions . . . . These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. And, while surely a closer question, these situations are still immeasurably, far removed from 'custodial interrogation' where, in *Miranda v. Arizona, supra*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

Id. at 231-32 (citation omitted).

Therefore, the *Schneckloth* Court left open the question of whether a "knowing and intelligent" waiver standard

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[7] As noted above, the trial court as factfinder assumed that Petitioner was in custody but found that fact to be irrelevant to Petitioner's motions to suppress (App. C at 24a, 27a).

would be required to ensure voluntary consent when a search took place during in-custody interrogations. *Id.* In an earlier case, this Court explained that, under such a standard, the State would have the burden to demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The State could fulfill its burden by establishing that an individual was informed of his right to refuse consent or otherwise knew of this right before consent to search was given.[8]

Three years later, the *Watson* Court partially answered this question, finding voluntary consent even though an in-custody defendant was not informed of his right to refuse consent. The Court, however, specifically noted that the defendant's consent had been "given while on a public street, not in the confines of the police station." *Watson*, 423 U.S. at 424. Accordingly, the question remains whether the Fourth Amendment requires a heightened standard for consent when a search is conducted on an in-custody defendant at a police station, as occurred in this case.[9] Petitioner respectfully contends that the

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[8] It is undisputed that no such evidence was presented in this case (J.A. 417-18, 456, 525).

[9] This Court's decision in *Robinette* does not resolve this question. *Ohio v. Robinette*, 519 U.S. 33 (1996). In *Robinette*, a defendant detained at a traffic stop consented to a search of his car. *Id.* at 35. He was not clearly informed that he was "free to go" before he consented, and was eventually found guilty on various drug possession charges. *Id.* On certiorari, this Court was presented with the question of "whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary." *Id.* The *Robinette* Court rejected such a rule. *Id.* In doing so, it reiterated *Schneckloth*'s holding that declined to adopt a per se rule requiring the prosecution to establish knowledge of the right to refuse consent as a prerequisite to establishing voluntary consent for a search conducted on a seized, rather than an

Constitution mandates such a "knowing and intelligent" waiver.

B. This Court Has Historically Recognized That There Is Compulsion Inherent In Police-Dominated Custodial Interrogations And Therefore Constitutional Safeguards Are Required

As this Court readily acknowledged in *Miranda*, the potential for coercion during an in-custody interrogation at a police station is great. *Miranda v. Arizona*, 384 U.S. 436 (1966). Such an environment, where examinations take place in a police-dominated, isolated and often unfamiliar atmosphere, can be both physically and, more typical in modern practice, psychologically oppressive. *Id.* at 447. "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. Without proper safeguards, this Court recognized, the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressure which effectively undermines the individual's ability to make a free and rational choice. *Id.* at 467.

The interrogation practices and coercive behaviors that place a defendant in an unfamiliar and intimidating atmosphere do not vary depending upon whether the defendant claims a violation of his Fourth or Fifth Amendment rights. Thus, the compelling pressures noted in *Miranda* necessarily exist regardless of the constitutional rights in question. Moreover, the *Schneckloth* Court itself recognized that constitutional protections during such in-

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in-custody, defendant. *Id.* at 39 (citing *Schneckloth*, 412 U.S. at 227). The *Robinette* Court, however, went no further than the *Schneckloth* Court on the facts or the law. *Id.* Accordingly, the question of whether the Fourth Amendment requires a heightened standard for consent when the search in question takes place while the defendant is in custody *at a police station* remains unanswered.

terrogations were necessary *to protect the fairness of the trial itself*:

> That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding process. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process.

Schneckloth, 412 U.S. at 240. The *Schneckloth* Court thus recognized that the " 'evils in the interrogation process,' " rather than the constitutional right in question, was the key factor in determining that a "knowing and intelligent" waiver standard was necessary in the *Miranda* case.[10] *Id.* (citing and quoting *Miranda*, 384 U.S. at 466). Likewise, the integrity of the fact-finding process would suffer greatly if police obtained *physical evidence*, rather than statements, from an in-custody defendant interrogated at a police station without the protection of a "knowing and intelligent" waiver standard. Accordingly, constitutional safeguards similar to those required in *Miranda* to protect Fifth Amendment rights should be required for consent searches conducted on in-custody defendants at the police station to protect equally important Fourth Amendment rights.[11]

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[10] The *Schneckloth* Court also recognized that its rationale for rejecting Fourth Amendment warnings under the facts of that case—because "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning"—did not extend to situations where the defendant was in custody, as *Miranda* imposed just such a rule in the Fifth Amendment context. *Schneckloth*, 412 U.S. at 231-32.

[11] Moreover, some courts already emphasize knowledge of the right to refuse consent in analyzing all Fourth Amendment consensual searches. *See, e.g., United States v. Fernandez*, 18 F.3d 874,

C. The Circuit Courts Have Applied Conflicting Standards To Determine Whether An Individual Has Given Voluntary Consent When In Custody At A Police Station

There has been confusion among the circuit courts regarding the proper standard to apply to determine whether a defendant, in custody at a police station, has given voluntary consent for a search. Recognizing the "compulsion inherent in custodial surroundings," *Miranda*, 384 U.S. at 458, and the additional potential for coercion when an in-custody search takes place out of the public eye and in a private location such as a police station, at least three circuit courts have considered whether the defendant was in a police station in determining the voluntariness of a search. For example, the Seventh Circuit found that the fact that a young woman was being held in custody at a police station when her consent to search was given was a *substantial factor* to consider in assessing the overall voluntariness of her consent. *United States v. Duran*, 957 F.2d 499, 503 (7th Cir. 1992). The Court eventually determined that her consent was valid, however, noting that the potentially coercive effect of her custody was mitigated by the fact that she was arrested during the day, without a show of force, was not kept under close restraint at the police station, and was not aggressively interrogated. *Id.* at 503. Similarly, the Fifth Circuit considered the fact that defendant consented to a search in the familiar surroundings of his home, rather than at the police station, in determining that his consent

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882 (10th Cir. 1994) ("Although informing a defendant of his right to refuse consent is not a prerequisite to establishing voluntary consent, we consider it a factor 'particularly worth noting.'") (citation omitted); *Duran*, 957 F.2d at 503 ("In light of all the circumstances—particularly the fact that the police informed Karen of her right to refuse consent—we cannot say that the district court's ruling on this matter was erroneous. . . .").

was voluntary. *United States v. Riley*, 968 F.2d 422, 426 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992). Likewise, in upholding the trial court's finding of voluntariness under the Fourth Amendment, the Sixth Circuit emphasized the fact that defendant was not searched at a police station but rather at his home. *United States v. Blakeney*, 942 F.2d 1001, 1016 (6th Cir.), *cert. denied*, 506 U.S. 990 (1992); *cf. United States v. Mendenhall*, 446 U.S. 544, 559 (1980) (emphasizing, in upholding the validity of consent, that defendant's presence in the police office was voluntary); *see also United States v. Ross*, No. 91-5151, 1992 U.S. App. LEXIS 1318, at *9 (4th Cir. Feb. 4, 1992) (citing *Watson* in support of the contention that a court should consider whether the defendant was in a public or secluded place when determining the validity of a Fourth Amendment consensual search); *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990) (same).

Other circuit courts are silent on the question of whether the fact that a consent to search takes place in a police station should be considered in assessing voluntariness under the Fourth Amendment. *See, e.g., United States v. Barnett*, 989 F.2d 546, 555 (1993), *amended* (Apr. 7, 1993), *amended* (1st Cir. Apr. 16, 1993), *cert. denied*, 510 U.S. 850 (1993); *Tukes v. Dugger*, 911 F.2d 508, 517 (11th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991).

It is apparent from this inventory of case law that lower courts are not applying a uniform standard when analyzing the constitutionality of a search conducted on an individual who is in custody at a police station. This confusion, moreover, does not present merely a theoretical question in conducting Fourth Amendment searches. Without an unambiguous standard to determine free and volun-

tary consent, the rationale behind the Fourth Amendment's exclusionary rule—to deter police officers from conducting unconstitutional searches by suppressing evidence collected as a result of such actions [12]—loses any coherence and the rule itself is made ineffective. Indeed, a rule can only effectively deter behavior if the standard applied is unmistakable in the minds of those individuals regulated by the rule.

As demonstrated above, the standard applied to consensual searches conducted on an individual who is in custody at a police station is far from clear. Moreover, this Court has long-recognized the coercion inherent in police-dominated custodial interrogations, and the need for constitutional safeguards such as a "knowing and intelligent" waiver to protect against the compelling pressures found in such examinations. *Miranda*, 384 U.S. at 467. This coercion exists regardless of whether the police are attempting to obtain physical evidence or a statement from the individual, and thus regardless of whether the individual is asserting his Fourth or Fifth Amendment rights. Therefore, this Court should grant Petitioner's petition for writ of certiorari to clarify the standard that should be applied to determine the voluntariness of a search conducted on an individual who is in custody at a police station.

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[12] The rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted).

II. IN ANY EVENT, THE TRIAL COURT VIOLATED THIS COURT'S SETTLED FOURTH AMENDMENT PRECEDENT BY FAILING TO CONSIDER WHETHER PETITIONER WAS IN CUSTODY IN DETERMINING THE VOLUNTARINESS OF HIS CONSENT

As explained above, police obtained access to Petitioner's jacket when he was in custody at the police station. The trial court denied Petitioner's motion to suppress the jacket and the bloodstains on the jacket, finding that he consented to any searches that took place (App. C at 26a-27a). In so holding, the court found that the question of whether Petitioner was in custody from the time he was taken from his uncles' house to the time police administered *Miranda* warnings was not "significant at this point because there had been no statements taken from him in that interim . . ." (App. C at 27a). Earlier, the court similarly noted that whether Petitioner was in custody was "not an issue in this case because . . . no evidence was obtained during this period of time . . ." (App. C at 24a).

The trial court, however, plainly violated settled Fourth Amendment precedent by failing to consider the fact that Petitioner was in custody at the time the alleged consent to search was given. As noted in Section IA above, while in *Schneckloth* and *Watson* the Court left open the question of whether knowledge of the right to refuse consent is a prerequisite to establishing voluntary consent when a defendant is in custody at a police station, the Court certainly recognized that whether a defendant is *in custody at all* is a significant factor to consider in determining the overall voluntariness of a consent to search. *Schneckloth*, 412 U.S. at 241-42; *Watson*, 423 U.S. at 424. Moreover, many circuit courts have acknowledged this settled precedent. *See, e.g., United*

States v. Garfio-Chavez, 162 F.3d 1165, 1998 WL 416815, at *3 (8th Cir. 1998) (noting that the court should consider factors such as whether the defendant was in custody or under arrest when consent was given); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (finding that the factors to be considered in determining voluntariness include whether the defendant was in custody); *United States v. Kozinski*, 16 F.3d 795, 810 (7th Cir. 1994) (holding that the factors to be considered in determining whether defendant consented to a search included whether he was in custody); *Barnett*, 989 F.2d at 555 (finding that sensitivity to the heightened possibility of coercion is appropriate when a defendant's consent is obtained when in custody); *Ross*, 1992 U.S. App. LEXIS 1318, at *9 (noting that the court should consider whether the defendant was arrested or in custody in assessing the voluntariness of consent); *United States v. Sanchez*, 635 F.2d 47, 58 (2d Cir. 1980) ("When the claimed consent has been given by a person in custody it is appropriate to be 'particularly sensitive to the heightened possibilities for coercion . . . .'"). Accordingly, because the trial court did not consider this important factor, its denial of Petitioner's motion to suppress clearly violated Petitioner's constitutional rights.

CONCLUSION

In order to settle the important question of federal law raised by this case, this Court should grant certiorari to review the decision of the Virginia Supreme Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF VIRGINIA

Record Nos. 980677, 980678

BOBBY WAYNE SWISHER

v.

COMMONWEALTH OF VIRGINIA

Nov. 6, 1998

Present: All the Justices.

HASSELL, Justice.

In these appeals, we review the capital murder conviction, sentence of death, and related convictions imposed upon Bobby Wayne Swisher.

I. PROCEEDINGS

On April 28, 1997, an Augusta County grand jury indicted Swisher for the following offenses: capital murder of Dawn McNees Snyder in the commission of abduction with the intent to defile the victim of such abduction or in the commission of or subsequent to rape or forcible sodomy in violation of Code § 18.2-31; abduction with intent to defile Snyder in violation of Code § 18.2-48;

rape of Snyder in violation of Code § 18.2-61; and forcible sodomy of Snyder in violation of Code § 18.2-67.1,

Swisher was tried before a jury and found guilty of the charged offenses. The jury fixed Swisher's punishment at life imprisonment for the abduction with intent to defile conviction, life imprisonment for the rape conviction, and life imprisonment for the forcible sodomy conviction. In the penalty phase of the capital murder trial, the jury fixed Swisher's punishment at death, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. After considering a report prepared by a probation officer pursuant to Code § 19.2-264.5, the trial court sentenced Swisher in accord with the jury verdicts.

We have consolidated the automatic review of Swisher's death sentence with his appeal of the capital murder conviction. Former Code § 17-110.1(F).* Swisher's appeal of his non-capital convictions was certified from the Court of Appeals, former Code § 17-116.06, and was consolidated with his capital murder appeal and given priority on our docket.

II. THE EVIDENCE

On February 5, 1997, Dawn McNees Snyder disappeared from a florist shop where she worked in Stuarts Draft in Augusta County. Her body was found on February 21, 1997, near a riverbank about two miles from the florist shop. Animals had eaten extensive portions of her

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* Effective October 1, 1998, Title 17 was superseded by Title 17.1. As this appeal was briefed and argued prior to the effective date of Code § 17.1-313, our review was conducted pursuant to otherwise identical provisions of the formerly applicable Code sections.

face, neck, and upper chest, and her identity was established by use of her dental records.

On February 22, 1997, the defendant, age 20, was at an apartment with two friends, one of whom was Clarence Henry Ridgeway, Jr. Swisher told Ridgeway that Swisher had abducted, raped, sodomized, and killed Snyder. Swisher stated: "You know the woman, Dawn Snyder . . . I killed her." Swisher related the following details to Ridgeway.

On February 5, 1997, about 7:15 p.m., Swisher's uncle drove Swisher by car to a grocery store located near the florist shop where Snyder worked. Swisher left the grocery store and walked to the florist shop. Swisher entered the shop, approached Snyder, and said, "I have a gun in my pocket." Swisher showed Snyder a "butcher knife with ridges" and directed her to go with him.

Swisher forced Snyder to leave the florist shop through a rear door, and they walked for some distance until they reached a field by the South River. Then, Swisher stopped Snyder and told her to "suck his dick." He forced her to perform an act of oral sodomy upon him, and he made her remove her clothes. After he raped her, she put her clothes on, and he forced her to perform another act of oral sodomy upon him.

Swisher decided to kill Snyder because she had "seen his face." He "pulled out the butcher knife" that had "ridges around the edge of the blade," and he "slit her across the left side of the face and was holding her; then slit her throat and then gouged her and then tossed her into a river." He walked along the riverbank, watching her in the river, asking her, "[a]re—are you dead yet?" After Snyder floated in the river for awhile, Swisher saw her "crawl up the bank." Then, "he got scared and took

off running straight to his house from that field." Swisher threw his knife in the river.

When Swisher finished his confession to Ridgeway, Swisher stated that "[i]t feels like [I] could do it again." The following morning, Ridgeway informed the Augusta County Sheriff's Office of Swisher's crimes.

On February 23, 1997, Sergeant William E. Lemerise, Sergeant K.W. Reed, and two other deputies went to a house where Swisher resided with his uncles, Paul H. Swisher and William E. Swisher. Sergeant Reed advised Bobby Swisher that he was a suspect in the murder of Dawn Snyder and asked if Swisher would accompany the deputies to the Sheriff's Office for questioning. Swisher, who did not object, accompanied the deputies. Sergeant Lemerise informed Swisher that he would be required to wear handcuffs while en route to the Sheriff's Office because of a departmental policy which required that the sheriff's personnel transport suspects in restraints for safety considerations. Lemerise told Swisher that he would have to wear these restraints even though he was not under arrest.

When Swisher arrived at the Sheriff's Office, about 10:15 p.m., the handcuffs were immediately removed from him, and he was taken to a "briefing room." The briefing room is an open room with a coffee machine and a drink machine. There are no bars on the windows or door locks in that room. Swisher was permitted to smoke cigarettes, and he was given coffee.

Sergeant Lemerise explained to Swisher that he was not under arrest, that he was a suspect, that the sheriff's personnel were going to ask him some questions, and that he was free to leave. Lemerise asked Swisher "how did he feel about the fact that he could walk out of there if he chose to, words to that effect . . . and [Swisher] ap-

peared at that point in time, although he was nervous . . . to be fine with the situation."

Swisher spoke with the deputies, but did not confess to the commission of any crimes until after he was arrested and twice read his Miranda rights after midnight on February 24. Swisher admitted, in an audiotaped confession, that he had sodomized, raped, and murdered Snyder by cutting her throat. He also stated that after he cut her throat, he threw her into the South River.

Dr. David Oxley, a medical examiner who performed an autopy on Snyder's body, was unable to render an opinion about the specific cause of Snyder's death. He did state, however, that it was an inescapable conclusion that Snyder's death was the result of violent causes "probably related to the neck." Dr. Oxley was not able to determine positively whether the victim's throat had been cut because animals had eaten her larynx, trachea, and the large arteries and veins that were in her neck. The highest concentration of blood on the victim's clothing appeared on a shirt around the neck area extending onto the chest area.

Patricia Taylor, a forensic scientist in the Forensic Biology Unit of the Western Regional Laboratory for the Commonwealth of Virginia, qualified as an expert witness on the subject of forensic DNA (deoxyribonucleic acid). She examined some panties that were found on Snyder's body. Her examination revealed that DNA consistent with Swisher's DNA was found in semen deposited on Snyder's panties. Taylor testified that the odds of the DNA found on Snyder's panties belonging to someone other than Swisher were one in 380,000,000 in the Caucasian population.

Spots of blood were found on Swisher's coat. Taylor testified that the DNA profile obtained from that coat is

consistent with the DNA profile of Snyder and different from the DNA profile of Swisher. Taylor testified that the probability of randomly selecting an individual unrelated to Snyder who had a DNA profile consistent with the DNA on Swisher's coat was approximately one in 1.3 billion in the Caucasian population. Dr. Taylor testified that the DNA profile obtained from spermatozoa heads extracted from the victim's stomach and esophagus were consistent with Swisher's DNA profile.

III. ASSIGNMENT OF ERROR PROCEDURALLY DEFAULTED

Swisher argues that the trial court erred in denying his motion to "declare the Virginia capital murder and death penalty statutes unconstitutional and to prohibit the imposition of the death penalty." Swisher claims that Virginia's death penalty statutes, "specifically . . . Code §§ 19.2-2[6]4.2 through 19.2-264.5, [and former Code §§ 17-110.1 and 17-110.2] . . . on their face and as applied, violate the Eighth Amendment prohibition against cruel and unusual punishment, the Sixth Amendment guarantee to a fair trial, and the Fourteenth Amendment guarantee that no person shall be deprived of life, liberty, or property without due process of law." In support of his contentions, Swisher merely refers this Court to a memorandum of law that he filed in the trial court.

We hold that Swisher's assertions are insufficient and constitute a procedural default. "An appellant who asserts that a trial court's ruling was erroneous has an obligation to state clearly to the appellate court the grounds for that assertion. A cross-reference to arguments made at trial is insufficient." *Spencer v. Commonwealth*, 240 Va. 78, 99, 393 S.E.2d 609, 622, *cert. denied*, 498 U.S. 908, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990); *Jenkins v. Commonwealth*, 244 Va. 445, 460-61, 423 S.E.2d 360,

370 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993).

IV. ISSUES PREVIOUSLY DECIDED

Swisher raised certain issues on appeal which have been decided adversely to his claims by our previous decisions. We adhere to those rulings, and we will not discuss them further. The issues previously resolved are:

(1) Whether the defendant should have been granted additional preemptory challenges. *See Strickler v. Commonwealth*, 241 Va. 482, 489, 404 S.E.2d 227, 232, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991); *Quesinberry v. Commonwealth*, 241 Va. 364, 371, 402 S.E.2d 218, 223 (1991), *cert. denied*, 502 U.S. 834, 112 S.Ct. 113, 116 L.Ed.2d 82 (1991); *Spencer*, 240 Va. at 84-85, 393 S.E.2d at 613; *Buchanan v. Commonwealth*, 238 Va. 389, 405, 384 S.E.2d 757, 767 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990).

(2) Whether the trial court erred in denying the defendant's request to mail a questionnaire to the potential jury venire. *See Goins v. Commonwealth*, 251 Va. 442, 454, 470 S.E.2d 114, 122, *cert. denied*, 519 U.S. 887, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996); *Strickler*, 241 Va. at 489-90, 404 S.E.2d at 232.

V. BILL OF PARTICULARS

Swisher filed a motion for a bill of particulars, requesting that the trial court enter an order requiring the Commonwealth:

> "a) To identify the grounds, and all of them, on which it contends that defendant is guilty of Capital Murder under . . . Code § 18.2-31.

"b) To identify the evidence, and all of it, upon which it intends to rely in seeking a conviction of Defendant upon the charge of Capital Murder.

"c) To identify the aggravating factors, if any, upon which it intends to rely in seeking the death penalty, should defendant be convicted of Capital Murder. Additionally:

"1) If the Commonwealth intends to prove 'vileness' as an aggravating factor, as set out in . . . Code . . . § 19.2-264.4C, to identify as many of the components of the factor, including torture, depravity of mind, and aggravated battery, on which it intends to offer evidence.

"2) If the Commonwealth intends to prove 'vileness' as an aggravating factor, as set out in . . . Code . . . § 19.2-264.4C, to further identify every narrowing construction of that factor on which it intends to offer evidence.

"3) If the Commonwealth intends to prove 'future dangerousness' as an aggravating factor, as set out in . . . Code . . . § 19.2-264.4C and pursuant to . . . Code . . . § 19.2-264.3:2, to identify any unadjudicated allegations of misconduct by defendant upon which it intends to offer evidence and any circumstances of the offense it contends are relevant to proof of the factor.

"4) If the Commonwealth intends to prove 'future dangerousness' as an aggravating factor, as set out in . . . Code . . . § 19.2-264.4C and pursuant to . . . Code . . . § 19.2-264.3:2, to further identify every narrowing construction of that factor on which it intends to offer evidence.

"d) To identify the evidence, and all of it, on which it intends to rely in support of the aggravating factors identified, and all other evidence which it intends to introduce in support of its contention that death is the appropriate punishment for this Defendant."

Swisher essentially contends that the Commonwealth should have been required to identify its evidence so that he could have made pretrial challenges to the application of Virginia's capital murder statute. Swisher also asserts that the aforementioned bill of particulars was needed to: insure that he would have effective assistance of counsel as guaranteed by the Sixth Amendment; assist him in challenging the suppression of certain evidence and; assist him in challenging the constitutionality of the vileness and future dangerousness factors in Code § 19.2-264.4, one of which must be established before the death penalty may be imposed. We disagree with Swisher.

"The purpose of a bill of particulars is to state sufficient facts regarding the crime to inform an accused in advance of the offense for which he is to be tried. He is entitled to no more." *Hevener v. Commonwealth*, 189 Va. 802, 814, 54 S.E.2d 893, 899 (1949); *accord Goins*, 251 Va. at 454, 470 S.E.2d at 123; *Quesinberry*, 241 Va. at 372, 402 S.E.2d at 223, *Strickler*, 241 Va. at 490-91, 404 S.E.2d at 233. A defendant is not entitled to a bill of particulars as a matter of right. *Quesinberry*, 241 Va. at 372, 402 S.E.2d at 223. Rather, Code § 19.2-230 states that a trial court "may direct the filing of a bill of particulars."

The trial court's decision whether to require the Commonwealth to file a bill of particulars is a matter that rests within its sound discretion. *Goins*, 251 Va. at 454, 470 S.E.2d at 123; *Quesinberry*, 241 Va. at 372, 402 S.E.2d at 223. The trial court did not abuse its discretion

in denying Swisher's motion. The indictment adequately informed Swisher of the charged offenses, and we are of opinion Swisher did not wish to use the bill to challenge the sufficiency of the indictment, but, as he has admitted in his brief, he desired the bill of particulars for other reasons.

Furthermore, Paragraphs B and D are simply demands for pre-trial disclosure of the Commonwealth's evidence to be introduced at trial and, as we have held, there is no general constitutional right to discovery in a criminal case, even when a capital offense is charged. *See Strickler*, 241 Va. at 490-91, 404 S.E.2d at 233. We do note that the Commonwealth, as required by Code § 19.2-264.3:2, provided Swisher with evidence of unadjudicated conduct that the Commonwealth planned to use to establish his future dangerousness, and Swisher does not claim that such information was not given to him. Moreover, as the trial court observed, Swisher was aware, well before trial, of the entirety of the Commonwealth's evidence through the Commonwealth's undisputed open file policy.

VI. DEFENDANT'S MOTIONS TO SUPPRESS

A.

Swisher filed a motion to suppress a confession that he made to the deputies after he had been given his Miranda warnings, and the trial court denied the motion. On appeal, Swisher contends that his confessions were "made at a time when he had not been advised of his rights to remain silent and his right to counsel and were not made within the guidelines of the standards set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." We disagree with Swisher.

In *Miranda*, the Supreme Court held that an individual must be warned before questioning by police of his right

to remain silent and his right to an attorney only when that "individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning. . . ." *Id.* at 478, 86 S.Ct. 1602. The Supreme Court subsequently explained in *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), that Miranda warnings are implicated only during a custodial interrogation:

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited."

We have also observed that Miranda warnings are not required in every instance when a suspect is interrogated at a police office. *Coleman v. Commonwealth*, 226 Va. 31, 47, 307 S.E.2d 864, 872 (1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984). We have stated that "[i]t is the custodial nature rather than the location of the interrogation that triggers the necessity for giving Miranda warnings." *Id.* at 47, 307 S.E.2d at 872; *accord Burket v. Commonwealth*, 248 Va. 596, 605, 450 S.E.2d 124, 129 (1994), *cert. denied*, 514 U.S. 1053, 115 S.Ct. 1433, 131 L.Ed.2d 314 (1995); *see*

Beckwith v. United States, 425 U.S. 341, 346, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).

Applying these principles, we hold that the deputies did not violate Swisher's Miranda rights. Initially, we note that Swisher did not make any incriminating statements between the time he left his uncles' house and the time he was placed under arrest at 12:05 a.m. on February 24. Before Swisher was arrested, the deputies informed him that he was free to leave the Sheriff's Office. After Swisher was arrested, he was informed of his Miranda rights twice. The record reveals that his confession was made knowingly, voluntarily, and intelligently, *Miranda*, 384 U.S. at 475, 86 S.Ct. 1602, and that his confession was "the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *accord Roach v. Commonwealth*, 251 Va. 324, 340-41, 468 S.E.2d 98, 108, *cert. denied*, 519 U.S. 951, 117 S.Ct. 365, 136 L.Ed.2d 256 (1996).

B.

Swisher filed a motion to suppress "all evidence, oral and physical, including any statements made by [him], whether prior to or subsequent to his arrest, and any property seized as a result of the arrest, detention or interrogation of [him]" and any property "seized by a warrantless search of the premises occupied by [him], and any property or goods seized by virtue of the search warrant for [his] body, which warrant was issued . . . on [February 25, 1997]."

Swisher contends that: his arrest was illegal; the deputies unlawfully searched and seized certain items from the house where he lived and; the deputies unlawfully searched his person by obtaining pubic hair, head hair, and blood.

When the deputies went to Swisher's uncles' house, they knocked on the door, and one of Swisher's uncles permitted the deputies to enter. As we have already stated, the deputies asked Swisher to accompany them to the Sheriff's Office, and he voluntarily agreed to do so. As Swisher was about to leave the house, one of the deputies asked Swisher if he would like to take a jacket with him because it was cold outside. A deputy helped Swisher put the jacket on.

At the Sheriff's Office, Sergeant A.C. Powers noticed a few dark spots on Swisher's jacket, and he asked Swisher for permission to test the jacket to determine whether the spots were blood. Swisher replied, "[t]hat's all right with me, because I don't know nothing about what you're talking about." When the test showed that blood was present on the jacket, Sergeant Lemerise asked Swisher for permission to send the jacket to a forensic laboratory for further testing and Swisher agreed.

While Swisher was still at the Sheriff's Office, some of the deputies asked one of Swisher's uncles for permission to search two large "burn barrels" which were on the uncles' property. The uncle gave the deputies permission to search, and they recovered several items from the barrels, including burned sneakers and a green shirt.

On February 24, 1997, some deputies returned to Swisher's uncles' house and asked William Swisher for permission to search the premises. The deputies gave William Swisher a consent form and told him that he did not have to consent to a search. William Swisher gave the deputies permission to search, and he signed the consent form.

We hold that the trial court did not err in denying the defendant's motion to suppress the evidence because the defendant's uncles gave the deputies consent to search the

house and the "burn barrels." We also note that none of the items taken from the consensual search of the "burn barrels" was admitted in evidence at Swisher's trial.

Additionally, the trial court did not err in refusing the defendant's motion to suppress the jacket. Swisher gave the deputies consent to test his jacket. The evidence of record supports the trial court's finding that in each instance, Swisher's consent was voluntary. *See Gray v. Commonwealth*, 233 Va. 313, 327, 356 S.E.2d 157, 164, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987).

We do not consider Swisher's conclusional statement that his arrest was illegal and, therefore, his pubic hairs, head hairs, and blood were illegally seized. Swisher does not assign as error that he was subject to an illegal arrest. Thus, this argument is beyond the scope of any assignment of error, and it is procedurally defaulted. Rule 5:17(c); *Burket*, 248 Va. at 613, 450 S.E.2d at 133.

VII. VENUE

Swisher argues that the tral court erred in denying his motion for a change of venue because the media coverage of his crime was purportedly inflammatory and contained information regarding his confession. Swisher asserts that these aspects of the media coverage required a change of venue in order to protect the rights afforded him under the Sixth Amendment of the United States Constitution. We disagree.

There is a presumption that a defendant can receive a fair trial from the citizens of the jurisdiction where the crimes occurred. The defendant must overcome this presumption by demonstrating that the feeling of prejudice on the part of the citizenry is widespread and is such that

would "be reasonably certain to prevent a fair trial." *Mueller v. Commonwealth*, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993) (quoting *Stockton v. Commonwealth*, 227 Va. 124, 137, 314 S.E.2d 371, 380, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984) (citation omitted)). The decision whether to grant a change of venue rests within the sound discretion of the trial court. *Roach*, 251 Va. at 342, 468 S.E.2d at 109. The trial court's ruling whether to change venue will not be disturbed on appeal unless the record affirmatively shows an abuse of discretion. *Mueller*, 244 Va. at 398, 422 S.E.2d at 388.

Extensive media coverage about an accused and his crimes does not necessarily require a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 767-68. Additionally, a significant factor that the trial court must consider is "the difficulty encountered in selecting a jury." *Mueller*, 244 Va. at 398, 422 S.E.2d at 388.

Swisher did not overcome the presumption that he could receive a fair trial in Augusta County, and the evidence of record does not affirmatively show that the trial court abused its discretion. Our review of the record reveals that the trial court was able to empanel a jury with relative ease. Swisher does not challenge on the appeal the seating of any juror on the basis of pre- trial publicity. Thus, the trial court did not abuse its discretion in denying Swisher's motion for a change of venue.

VIII. VOIR DIRE

Swisher argues that the trial court erred in refusing to permit him to ask certain questions to the jury panel during voir dire. Swisher says that because his trial was extensively covered by the media, he should have been

permitted to ask a wide range of questions to potential jurors. We disagree with Swisher's contention.

As we stated in *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984), "[a] party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause,' but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so." Swisher fails to identify any questions that the trial court prohibited. Swisher's conclusional contention does not specify how the trial court abused its discretion, and he fails to demonstrate how he was prejudiced by the trial court's rulings.

IX. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Swisher asserts that the trial court erred by denying his motion to dismiss the indictment charging him with capital murder under Code § 18.2-31(1), which states in relevant part:

> "The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> 1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction;"

Swisher claims that the term intent "to defile" fails to inform "a defendant or any person of ordinary intelligence of what conduct makes him eligible for a death sentence

through commission of capital murder." Continuing, Swisher says that the term intent "to defile" does not provide sufficient guidance to the jury as it considers whether to impose the sentence of death. Swisher claims that these purported statutory deficiencies contravene his constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution.

We find no merit in Swisher's contentions. An act which creates a statutory offense "must specify with reasonable certainty and definiteness the conduct which is commanded or prohibited . . . so that a person of ordinary intelligence may know what is thereby required of him." *Caldwell v. Commonwealth*, 198 Va. 454, 458, 94 S.E.2d 537, 540 (1956); *McCutcheon v. Commonwealth*, 224 Va. 30, 35, 294 S.E.2d 808, 811 (1982). We have stated that the phrase intent "to defile" is interchangeable, within the meaning of Code § 18.2-48, with the phrase "sexually modest." *Scott v. Commonwealth*, 228 Va. 519, 525 n. 2, 323 S.E.2d 572, 576 n. 2 (1984); *see Wilson v. Commonwealth*, 249 Va. 95, 103-04, 452 S.E.2d 669, 675, *cert. denied*, 516 U.S. 841, 116 S.Ct. 127, 133 L.Ed.2d 76 (1995). We are of the opinion that a person of ordinary intelligence would also conclude that the term intent "to defile" is interchangeable with the phrase intent to "sexually molest." Thus, we hold that the indictment adequately informed Swisher of the charges against him and that the jury would have concluded that the term intent "to defile" was synonymous with the phrase intent to "sexually molest."

X. ADMISSIBILITY OF EVIDENCE

As we have already stated, Patricia Taylor testified as an expert witness on the subject of DNA on behalf of the Commonwealth. During her direct examination, Taylor testified that the DNA profile obtained from sperm found

in Snyder's rectum, vagina, esophagus, and stomach was consistent with the mixture of DNA profiles of Swisher and Snyder, that sperm found on the crotch of Snyder's panties was consistent with Swisher's DNA, and that blood found on Swisher's coat was consistent with the DNA profile of Snyder.

During cross-examination, Swisher attempted to examine Taylor about "genetic material" found on a pillowcase which had not been admitted in evidence. The Commonwealth objected to the defendant's questions about the pillowcase on the basis that the pillowcase had not been admitted in evidence, and the pillowcase was not relevant to any issues at trial. The trial court gave Swisher's counsel several opportunities to explain to the court the relevance of the pillowcase. The trial court ruled that Swisher's questions about the pillowcase were not relevant because the pillowcase had not been admitted in evidence, no claim of custody had been established which would permit the admission of the pillowcase in evidence, and testimony about the pillowcase would only be confusing to the jury.

The decision to refuse or admit evidence based on relevance rests within the discretion of the trial court, *Beck v. Commonwealth*, 253 Va. 373, 384-85, 484 S.E.2d 898, 905, cert. denied, —— U.S. ——, 118 S.Ct. 608, 139 L.Ed.2d 495 (1997), and we hold that the trial court did not abuse its discretion. Indeed, Swisher's counsel was unable to demonstrate either in the trial court or on brief why the questions about the pillowcase were relevant to any issues at trial.

XI. JURY INSTRUCTIONS

Swisher proffered the following jury instructions which were refused by the trial court:

"INSTRUCTION NO. R-1

"If you find that the defendant was so greatly intoxicated by the voluntary use of alcohol and drugs that he was incapable of deliberating or premeditating, then you cannot find him guilty of capital murder or murder in the first degree.

"Voluntary intoxication is not a defense to second degree murder or manslaughter."

"INSTRUCTION NO. Q

"You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense."

"For example, if you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. If you have a reasonable doubt as to whether he is guilty of first degree murder or second degree murder, you shall find him guilty of second degree murder or of voluntary manslaughter. If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty."

Swisher, who stated in his confession to the deputies that he had consumed crack cocaine and alcohol on the day of the murder, argues that the trial court erred by refusing to grant Instruction R-1. Swisher says that the trial court erred by refusing to grant Instruction Q because "the evidence was that [he] was on crack cocaine and one of the effects of the drug is that it inflames the passions of the user."

Swisher's assertions are without merit. Generally, voluntary intoxication is not an excuse for any crime. *Wright*

v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988). We have stated that the only exception to this general rule is in cases involving deliberate and premeditated murder. Id. Even though it has long been the rule in this Commonwealth that a defendant may negate the specific intent requisite for capital murder or first degree murder by showing that he was so greatly intoxicated that he was incapable of deliberation or premeditation, *Essex v. Commonwealth*, 228 Va. 273, 281-82, 322 S.E.2d 216, 219-20 (1984); *Fitzgerald*, 223 Va. at 631, 292 S.E.2d at 807; *Giarratano v. Commonwealth*, 220 Va. 1064, 1073, 266 S.E. 94, 99 (1980), "[v]olutary immediate drunkeness is not admissible to disprove malice or [to] reduce the offense to manslaughter." *Johnson v. Commonwealth*, 135 Va. 524, 531, 115 S.E. 673, 676 (1923) (quoting *Willis v. Commonwealth*, 73 Va. (32 Gratt.) 929, 936 (1879)).

We hold that the trial court properly refused the defendant's proposed instructions because these instructions contained incorrect statements of the law. The proposed instructions would have permitted the jury to find the defendant guilty of manslaughter because of his purported voluntary intoxication, which is contrary to the common law of this Commonwealth.

XII. SENTENCE REVIEW

Former Code § 17-110.1(C)(2) requires this Court to review the imposition of the sentence of death imposed upon Swisher, based on the trial record, to determine whether (i) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, or (ii) the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We observe that Swisher does not contend that the death penalty was imposed under the

influence of any of the above factors prohibited by the statute, nor does he contend that the sentence is excessive or disproportionate to the penalty imposed in similar cases. Nevertheless, we have examined the records of all capital cases reviewed by this court, pursuant to former Code § 17-110.1(E). *See Barnabei v. Commonwealth*, 252 Va. 161, 179-80, 477 S.E.2d 270, 281 (1996), *cert. denied*, 520 U.S. 1224, 117 S.Ct. 1724, 137 L.Ed.2d 845 (1997); *Breard v. Commonwealth*, 248 Va. 68, 89, 445 S.E.2d 670, 682, *cert. denied*, 513 U.S. 971, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994).

Upon review of these cases, as well as cases in which life imprisonment was imposed, we hold that Swisher's sentence of death is neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature. Furthermore, based upon our review of the record, we find nothing that suggests that Swisher's sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

XIII. CONCLUSION

We find no reversible error in the issues presented here. Having reviewed all Swisher's contentions and the imposition of Swisher's sentence of death pursuant to former Code § 17-110.1, we hold that the conviction of capital murder and sentence of death will be affirmed, and we will also affirm the judgments entered for Swisher's non-capital convictions.

Record No. 980677—Affirmed.

Record No. 980678—Affirmed.

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of January, 1999.

Record Nos. 980677 and 980678
Circuit Court Nos. CR97-103(00)
through CR97-103(03)

BOBBY WAYNE SWISHER,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 6th day of November, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ [Illegible]

Clerk

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

Criminal Number: 97000103

COMMONWEALTH OF VIRGINIA

v.

BOBBY WAYNE SWISHER

The following is a transcript of the evidence presented at the Hearing on Motion to Suppress and Motion for Change of Venue in the above-styled case, held on September 10, 1997, as transcribed from the dictaphone cassettes taken from the machine operated by the Clerk of said Court, heard before the Honorable T. H. Wood, Judge of said Court.

The motions, objections and exceptions are included as they occur during the progress of the hearing.

* * * *

[1] JUDGE WOOD: Mr. Ervin, are you ready to proceed in the case of *Commonwealth of Virginia v. Bobby Wayne Swisher*?

MR. ERVIN: Yes, sir.

JUDGE WOOD: Mr. Poindexter, are you ready to proceed?

MR. POINDEXTER: Yes, your Honor, we are ready to proceed.

JUDGE WOOD: Let the record reflect the Defendant is present in the Courtroom with his attorney. Gentlemen, we have a number of Motions today, as I understand it?

MR. ERVIN: Yes, sir.

* * * *

[52] JUDGE WOOD: All right. Gentlemen, the man . . . no evidence was obtained during the period of time that he was taken from his house to the point he was given his Miranda warning. No evidence was obtained and whether he was under arrest and whether he was in custody . . . he wasn't under arrest, obviously he wasn't under arrest. If he was in custody or not, I don't . . . gentlemen, it seems to me like it's a . . . it's not an issue in this case because nothing . . . no evidence was obtained during this period of time when he first was taken to the Sheriff's Department. The Sheriff's Department gained other information which as Sgt. Lemerise has explained led him to secure arrest warrants and arrest the man. And then at that point, the Miranda warnings were given and so this statement, gentlemen, taken from him, is not in violation of Miranda, of that doctrine. With respect to his status, his mental status during his conversation with Sgt. Wood. Gentlemen, only the two of them were there and then Sgt. Reed was there after about 45 minutes. What you can tell from the tape to me is that there's a young man who is very upset, and he is young. He hasn't quite reached his 21st birthday and he is coming to grips with what he has done and he is obviously extremely upset and crying virtually throughout the whole tape. I am sure he's scared. But gentlemen, as far as anybody saying that he was being coerced or under duress or not aware of where he is, gentlemen, that is just is not in that tape anywhere, so I'm going to overrule your Motion, Mr. Poindexter, as to the [53] aspect that it raises the question of whether it was voluntary in fact. Now, this tape is going to be admissible for the jury. His emotional state is a question for the jury to consider and

because the jury is responsible for the weight that's given to this tape, as you know. The question of whether it is admissible or not is my decision. The weight to be given to it is to the jury and certainly, they ought to be able to hear this tape.

MR. POINDEXTER: Judge, I want to object and except based upon the evidence in the argument and in addition to that Sgt. Lemerise himself testified from the stand that they had two statements from people, but they had not decided that Mr. Swisher was guilty until they had him in the room questioning him prior to giving him the Miranda warnings, they saw the bruises on him and saw the blood on his jacket, all that was found, but then he put him under arrest and I suggest to you that that's not admissible and that he was unlawfully arrested and that his statement would never have been given if they hadn't put him . . . taken him into custody and gotten all this information from him without giving him Miranda warnings. That's why he was put under arrest and put into jail and gave his statement, so I object to the ruling.

JUDGE WOOD: I disagree with your statement as to the evidence. You've got your version of it and . . .

MR. POINDEXTER: I understand that, but that's exactly what he said . . .

JUDGE WOOD: I don't accept your version of what Sgt. [54] Lemerise said. Gentlemen, I guess the tape is going to speak for itself. All right. Anything further?

* * * *

[79] MR. CURD: Your Honor, this is not, the trash barrel is (inaudible) it's not an open, the trash barrel is not (inaudible) not open for public view, whether it has a cover on it or not, and I suggest that none of these exceptions to the warrantless search are applicable in this instance and certainly not in plain view and the view was

obtained by unlawful entry and seizure. It's not open view. And that's all I have to say.

JUDGE WOOD: Mr. Curd, I'm going to overrule your Motion and I will note your objection to the ruling of the Court. Very briefly, gentlemen, with respect to this stuff in the trash can, there are cases on trash and trash cans and I'm going to suggest to you that that property that was put in there and burned and left in the trash can outside the house had been abandoned. I don't believe anyone has a reasonable expectation of privacy under such circumstances and it is my understanding of this house is that it belongs to the uncle anyway. I haven't heard any suggestion here that it belongs to the Defendant. But in any event, they got permission, they had permission for every aspect of this case and they were very careful to get it and I think probably at the earlier hearing someone asked Sgt. Lemerise what would he have done if the man hadn't consented and he honestly said he didn't know what he would have done. But, we are not confronted with that. In this case, Mr. Swisher [80] consented to every aspect of this matter, all along. So gentlemen, there were no statements taken from him between the time that he agreed to go to the Sheriff's Department even if you assume at that point he was in custody. There were no statements taken from him between that time and the time he was formally placed under arrest and advised of his Miranda rights. No statements that I've heard of and none that . . . if the Commonwealth intends to introduce statements, incriminating statements made by this man during that period of time, gentlemen, I guess we can take a real hard look at whether he was in custody. He obviously wasn't under arrest, but the question would be whether he was in custody or not for purpose of whether he should have been advised of his Miranda rights. If they try to introduce any incriminating

statements made during that period of time, then we will take a look at it. But the evidence before me is that they didn't seize that coat, that he wore it, in the middle of February, or the end of February, snow was on the ground, so he wore his coat there and the obvious thing in the testimony here is that after they got to the police department when they saw something on the coat that caught their . . . and then they asked him at that point, Can we test it, Yes, he answered, yes, I didn't have anything to do with this matter, I don't care what you do with it. So they did. Gentlemen, I just don't see any (inaudible) Amendment implication here because I don't think there is any search here. The issue of whether he was in custody or not, when he left his uncle's house to ride in here to the Sheriff's [81] Department, I don't believe is significant at this point because there had been no statements taken from him in that interim, so that's why I'm overruling your Motion, Mr. Curd and I've noted your objection to the ruling of court.

MR. CURD: Thank you, Judge.

MR. ERVIN: Thank you, Judge.

JUDGE WOOD: All right.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

March 9, 1999

Ms. Barbara Kagan
Steptoe & Johnson
1330 Connecticut Ave, NW
Washington, DC 20036

RE: Bobby Wayne Swisher
v. Virginia
Application No. A-749

Dear Ms. Kagan:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on March 9, 1999, extended the time to and including May 7, 1999.

* * * *

Sincerely,

WILLIAM K. SUTER

By /s/ Sandra Elliott Spagnolo
SANDRA ELLIOTT SPAGNOLO
Assistant Clerk

APPENDIX E

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF AUGUSTA

Criminal Number: 97000103

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

BOBBY WAYNE SWISHER,
Defendant.

MOTION TO SUPPRESS

Comes now the defendant, Bobby Wayne Swisher, by counsel, and pursuant to Section 19.2-60 of the Code of Virginia, 1950, as amended, moves the Court to order the suppression of all evidence, oral and physical, including any statements made by the defendant, Bobby Wayne Swisher, whether prior to or subsequent to his arrest, and any property seized as a result of the arrest, detention or interrogation of the defendant, and any property seized by a warrantless search of the premises occupied by the defendant, and any property or goods seized by virtue of the search warrant for the body of the defendant, which warrant was issued by Lynn Homes Vance, Magistrate, on the 25th day of February, 1997, and the defendant further respectfully requests that the Court order any statement or evidence improperly obtained be excluded from any trial of charges brought against the defendant as a result of the seizure of such evidence, and further,

that such improperly obtained evidence not be used for any investigative purpose, including obtaining derivative evidence; and in support of this Motion, the defendant, by counsel, respectfully represents as follows:

1. The defendant herein is charged in the above-styled case with the offenses of: capital murder, felony abduction, rape, and sodomy.

2. The defendant shows that on or about February 24, 1997, he was illegally arrested and charged with the above-stated offenses in that no crime was committed in the presence of the arresting officers; and the arrest warrant was issued based upon information and material illegally obtained by the Augusta County Sheriff's Department.

3. Prior to said illegal arrest, the Augusta County Sheriff's Department searched the premises occupied by the defendant and retrieved certain items of clothing, two knives, a towel, and a pillowcase.

4. Subsequent to said illegal arrest, the Augusta County Sheriff's Department searched the defendant's person and retrieved pubic hairs, head hairs, and blood of defendant.

5. The defendant anticipates that said illegally seized items will be offered as evidence against him at his trial on said charges.

6. The defendant shows that the aforesaid illegal searches and seizures were conducted unlawfully and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America, and of Article 1 and 10 of the Constitution of Virginia in that said acts on the part of the arresting officers constituted an unreasonable search and seizure in violation of said provisions.

7. Defendant specifically shows that said illegal search of the premises occupied by the defendant and seizure thereto was conducted prior to his being arrested and charged with any criminal acts.

8. Defendant specifically shows that said illegal search of the defendant's person and seizure thereto was conducted subsequent to and as a result of his being arrested and charged with any criminal acts.

9. The defendant further states that he is an aggrieved person by virtue of these unlawful searches and seizures and by virtue of the charges pending against him which arose out of the aforementioned unlawful searches and seizures against his will and without his consent, all in violation of his rights under the laws of the Commonwealth of Virginia and in further violation of the Fourth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, the defendant prays:

(a) That this Court inquire into these matters and issue an order suppressing any and all evidence, oral and physical, seized as a result of the said illegal searches and seizures and rule the same inadmissible upon any trial of the charges set out in the Indictment of defendant;

(b) That this Court issue an order excluding any statement or evidence improperly obtained; and

(c) That an order be issued precluding the Commonwealth's Attorney, any and all of his Assistants, and any and all Commonwealth's witnesses from testifying to the subject matter of these illegal searches and seizures and to refrain from any reference to those aforesaid searches or items seized thereunder, as the same constitutes the "fruit of the poisonous tree."

Respectfully submitted

BOBBY WAYNE SWISHER
By Counsel

Gorden W. Poindexter, Jr. (VSB #03857)
Counsel for Defendant
Poindexter & Schorsch, P.C.
404 South Wayne Avenue
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/s/ James W. Curd
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540-943-2011

APPENDIX F

IN THE
SUPREME COURT OF VIRGINIA

Record No. 980677

BOBBY WAYNE SWISHER,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF APPELLANT

---

* * * *

7. *The Court Erred in Denying Defendant's Motion To Suppress Filed July 24, 1997.*

Pursuant to Section 19.2-60 of the Code of Virginia, 1950, as amended. Appellant moved the trial court to order the suppression of all evidence, oral and physical, including any statements made by the Appellant whether prior to or subsequent to his arrest, and any property seized as a result of the arrest, detention or interrogation of him and any property seized by a warrantless search of the premises occupied by the Appellant, and any property or goods seized by virtue of the search warrant for his body, which warrant was issued by Lynn Homes Vance, Magistrate, the the 25th day of February, 1997.

The Appellant further requested that the trial court order any statement or evidence improperly obtained be excluded from any trial of charges brought against him as a result of the seizure of such evidence, and further, that such improperly obtained evidence not be used for any investigative purpose, including obtaining derivative evidence.

The Appellant showed that on or about February 24, 1997, he was illegally arrested and charged with offenses in that no crime was committed in the presence of the arresting officers; and the arrest warrant was issued based upon information and material illegally obtained by the Augusta County Sheriff's Department.

Prior to said illegal arrest, the Augusta County Sheriff's Department searched the premises occupied by the Appellant and retrived certain items of clothing, two knives, a towel, and a pillowcase.

Subsequent to said illegal arrest, the Augusta County Sheriff's Department searched the Appellant's person and retrieved pubic hairs, head hairs, and blood of Appellant.

Such illegally seized items were offered as evidence against him at his trial.

The aforesaid illegal searches and seizures were conducted unlawfully and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America, and of Article 1 and 10 of the Constitution of Virginia in that said acts on the part of the arresting officers constituted an unreasonable search and seizure in violation of said provisions.

Appellant specifically showed that said illegal search of the premises occupied by the Appellant and seizure thereto was conducted prior to his being arrested and charged with any criminal acts.

Appellant specifically showed that said illegal search of the Appellant's person and seizure thereto was conducted subsequent to and as a result of his being arrested and charged with any criminal acts.

The Appellant is an aggrieved person by virtue of these unlawful searches and seizures and by virtue of the charges placed against him which arose out of the aforementioned unlawful searches and seizures against his will and without his consent, all in violation of his rights under the laws of the Commonwealth of Virginia and in further violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The arrest of the Appellant was unlawful because it was based, at least in part, upon the unlawful questioning of the Appellant in that he was held in custody but was not given proper Miranda rights warnings and the arrest was also based upon evidence unlawfully seized.

Oral statements produced by an unlawful arrest and custody are excludable generally on Fourth Amendment grounds, e.g., *Brown v. Illinois,* 493 U.S. 590 (1995); *Thompson v. Commonwealth,* 10 Va. App. 117, 390 S.E.2d 198 (1990). Meeting the burden of showing the voluntariness and overcoming the taint may require more from the Commonwealth than that a set of valid *Miranda* warnings was given after the wrongful arrest but before the statements were made. See generally, *Lanier v. South Carolina,* 474 U.S. 25 (1985).

Supreme Court, U.S.
FILED
JUN 1 1999
CLERK

(2)

No. 98-1801

In The

Supreme Court of the United States

BOBBY WAYNE SWISHER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

MARK L. EARLEY
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1488

QUESTION PRESENTED

Has petitioner failed to preserve his claim that his consent to search his jacket was unknowing and unintelligent?

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STATEMENT OF THE CASE

On October 29, 1997, a jury in the Circuit Court for Augusta County, Virginia, convicted the petitioner, Bobby Wayne Swisher, of capital murder, abduction with the intent to defile, rape and forcible sodomy. The jury fixed Swisher's punishment at life for each of the non-capital convictions. The jury also sentenced Swisher to death on the capital murder conviction, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code § 19.2-264.4. In a separate sentencing hearing held February 18, 1998, the trial judge imposed sentence in accordance with the jury's verdicts.

On November 6, 1998, the Supreme Court of Virginia affirmed Swisher's conviction and death sentence. *Swisher v. Commonwealth*, 256 Va. 471, 506 S.E.2d 763 (1998).

STATEMENT OF FACTS

The Virginia Supreme Court summarized the facts surrounding Swisher's offense as follows:

> On February 5, 1997, Dawn McNees Snyder disappeared from a florist shop where she worked in Stuarts Draft in Augusta County. Her body was found on February 21, 1997, near a riverbank about two miles from the florist shop. Animals had eaten extensive portions of her face,

neck and upper chest, and her identity was established by use of her dental records.

On February 22, 1997, the defendant, age 20, was at an apartment with two friends, one of whom was Clarence Henry Ridgeway, Jr. Swisher told Ridgeway that Swisher had abducted, raped, sodomized, and killed Snyder. Swisher stated: "You know the woman, Dawn Snyder . . . I killed her." Swisher related the following details to Ridgeway.

On February 5, 1997, about 7:15 p.m., Swisher's uncle drove Swisher by car to a grocery store located near the florist shop where Snyder worked. Swisher left the grocery store and walked to the florist shop. Swisher entered the shop, approached Snyder, and said, "I have a gun in my pocket." Swisher showed Snyder a "butcher knife with ridges" and directed her to go with him.

Swisher forced Snyder to leave the florist shop through a rear door, and they walked for some distance until they reached a field by the South River. Then, Swisher stopped Snyder and told her to "suck his dick." He forced her to perform an act of oral sodomy upon him, and he made her remove her clothes. After he raped her, she put her clothes on, and he forced her to perform another act of oral sodomy upon him.

Swisher decided to kill Snyder because she had "seen his face." He "pulled out the butcher knife" that had "ridges around the edge of the blade," and he "slit her across the left side of the face and was holding her; then slit her throat and then gouged her and then tossed her into a river." He walked along the riverbank, watching her in the river, asking her, "[a]re – are you dead

yet?" After Snyder floated in the river for awhile, Swisher saw her "crawl up the bank." Then, "he got scared and took off running straight to his house from that field." Swisher threw his knife in the river.

When Swisher finished his confession to Ridgeway, Swisher stated that "[i]t feels like [I] could do it again." The following morning, Ridgeway informed the Augusta County Sheriff's Office of Swisher's crimes.

On February 23, 1997, Sergeant William E. Lemerise, Sergeant K.W. Reed, and two other deputies went to a house where Swisher resided with his uncles, Paul H. Swisher and William E. Swisher. Sergeant Reed advised Bobby Swisher that he was a suspect in the murder of Dawn Snyder and asked if Swisher would accompany the deputies to the Sheriff's Office for questioning. Swisher, who did not object, accompanied the deputies. Sergeant Lemerise informed Swisher that he would be required to wear handcuffs while en route to the Sheriff's Office because of a departmental policy which required that the sheriff's personnel transport suspects in restraints for safety considerations. Lemerise told Swisher that he would have to wear these restraints even though he was not under arrest.

When Swisher arrived at the Sheriff's Office, about 10:15 p.m., the handcuffs were immediately removed from him, and he was taken to a "briefing room." The briefing room is an open room with a coffee machine and a drink machine. There are no bars on the windows or door locks in that room. Swisher was permitted to smoke cigarettes, and he was given coffee.

Sergeant Lemerise explained to Swisher that he was not under arrest, that he was a suspect, that the sheriff's personnel were going to ask him some questions, and that he was free to leave. Lemerise asked Swisher "how did he feel about the fact that he could walk out of there if he chose to, words to that effect . . . and [Swisher] appeared at the point in time, although he was nervous . . . to be fine with the situation."

Swisher spoke with the deputies, but did not confess to the commission of any crimes until after he was arrested and twice read his Miranda rights after midnight on February 24. Swisher admitted, in an audiotaped confession, that he had sodomized, raped and murdered Snyder by cutting her throat. He also stated that after he cut her throat, he threw her into the South River.

Dr. David Oxley, a medical examiner who performed an autopsy on Snyder's body, was unable to render an opinion about the specific cause of Snyder's death. He did state, however, that it was in inescapable conclusion that Snyder's death was the result of violent causes "probably related to the neck." Dr. Oxley was not able to determine positively whether the victim's throat had been cut because animals had eaten her larynx, trachea, and the large arteries and veins that were in her neck. The highest concentration of blood on the victim's clothing appeared on a shirt around the neck area extending onto the chest area.

Patricia Taylor, a forensic scientist in the Forensic Biology Unit of the Western Regional Laboratory for the Commonwealth of Virginia,

qualified as an expert witness on the subject of forensic DNA (deoxyribonucleic acid). She examined some panties that were found on Snyder's body. Her examination revealed that DNA consistent with Swisher's DNA was found in the semen deposited on Snyder's panties. Taylor testified that the odds of the DNA found on Snyder's panties belonging to someone other than Swisher were one in 380,000,000 in the Caucasian population.

Spots of blood were found on Swisher's coat. Taylor testified that the DNA profile obtained from that coat is consistent with the DNA profile of Snyder and different from the DNA profile of Swisher. Taylor testified that the probability of randomly selecting an individual unrelated to Snyder who had a DNA profile consistent with the DNA on Swisher's coat was approximately one in 1.3 billion in the Caucasian population. Dr. Taylor testified that the DNA profile obtained from spermatozoa heads extracted from the victim's stomach and esophagus were consistent with Swisher's DNA profile.

Swisher, 256 Va. at 475-478, 506 S.E.2d at 765-76.

REASONS FOR DENYING THE WRIT

SWISHER'S FACT-SPECIFIC CLAIM THAT HIS CONSENT TO SEARCH HIS JACKET WAS NOT KNOWING AND INTELLIGENT IS NOT PRESERVED FOR REVIEW.

Prior to trial, Swisher moved to suppress all "property seized as a result of [his] arrest." (JA 132). Included

in this motion was a request to suppress evidence obtained as a result of a luminol test performed on the jacket Swisher wore when he voluntarily accompanied sheriff's deputies to the department for questioning. In his written motion and at the hearing on the motion, Swisher asserted that the physical evidence, including the jacket, ought to be suppressed either because it had been obtained without a warrant or because it had been obtained as a result of his alleged illegal arrest. (JA 132-135). After hearing testimony on the matter, the trial court ruled that the search of the jacket was consensual and refused to suppress the jacket. (JA 532).

On direct appeal, Swisher never challenged the trial court's ruling that he had consented to the luminol testing of the jacket. Rather, Swisher reasserted that the jacket was obtained and searched improperly because he allegedly had been arrested illegally. The Virginia Supreme Court, not having been presented with a question of whether Swisher's consent was "voluntary," never decided that issue. The Court, however, in ruling that the search conducted by the police was constitutional, found that Swisher was not "in custody" at the time of the testing and reiterated the trial court's uncontested finding that Swisher had consented to the luminol testing of his jacket. *Swisher*, 256 Va. at 482-483, 506 S.E.2d at 769-770 (noting that before Swisher was arrested at 12:05 a.m., Swisher was "free to leave the Sheriff's Office" and that the record evidence "supports the trial court's finding that . . . Swisher's consent was voluntary"). Nevertheless, Swisher asserts certiorari is warranted to address the consent search of his jacket and whether "consent to search can be voluntary when such consent is given by an

individual in custody at a police station, who has not given a knowing and intelligent waiver of his Fourth Amendment rights." (Petition at 6)

A. Not raised below

In the court below, Swisher never challenged the trial court's ruling that he voluntarily consented to the testing of his jacket. He certainly never alleged that his consent was unknowing and unintelligent because he allegedly was "in custody" at the time of the consent. Because the claim was not raised in the Court below, certiorari is not warranted. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); Rule 14.1(g)(i).[1]

B. Factual question

The state courts' fact-specific determinations that "Swisher gave [police] consent to test his jacket," *Swisher*, 256 Va. at 483, 506 S.E.2d at 769, clearly do not warrant a

---

[1] Swisher may argue that he preserved a challenge to the voluntariness of his consent in a petition for rehearing. He clearly did not. Swisher's petition for rehearing challenged his consent on **Fifth Amendment** grounds, not on the Fourth Amendment grounds he alleges here. In any event, raising the federal question for the first time in a petition for rehearing is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). The Virginia Supreme Court summarily denied Swisher's petition for rehearing.

grant of certiorari. *See* U.S.S.Ct. Rule 10 (certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). *See also Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("an intensively fact-specific case in which the Court below unquestionably applied the correct rule and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original); *Texas v. Mead*, 465 U.S. 1041 (1994) (Stevens, J.) (court does not review cases which primarily present questions of fact). This Court, moreover, should not grant certiorari to redecide the factual findings of the two lower courts. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985) (factual findings made by the trial court and upheld by the appellate court should not be reviewed under the "two court" rule).

C. No merit

Contrary to Swisher's repeated assertions, he simply was not "in custody" at the time he voluntarily consented to having his jacket tested. The Virginia Supreme Court found that before Swisher was arrested at 12:05 a.m. on February 24, 1997, Sheriff's deputies "informed [Swisher] he was free to leave the Sheriff's Office." *Swisher*, 256 Va. at 482, 506 S.E.2d at 769. Thus, Swisher's case does not even present the question he would have this Court decide: under what circumstances a person ***in custody*** knowingly and intelligently consents to a search. And, although Swisher never challenged on direct appeal the trial judge's finding that he consented to a search of his jacket, Swisher's position in the trial court was that he

never consented to a search, not that his consent somehow was unknowing or unintelligent. (JA 495).

In any event, it is clear that Swisher knowingly and intelligently consented to having his jacket tested. In fact, the trial judge specifically credited, and the Virginia Supreme Court cited, the testimony of Sergeant William Lemerise in this regard. Lemerise testified that he explained the purpose of the luminol test to Swisher (JA 456), and then asked Swisher whether deputies could test his jacket. Swisher replied, "that's all right with me, because I don't know nothing about what you're talking about." *Swisher*, 256 Va. at 483, 506 S.E.2d at 769. In addition, after the luminol test showed that blood was present on the jacket, Sergeant Lemerise "explained to Swisher that the test was positive." (JA 456). Lemerise then "asked Swisher for permission to send the jacket to a forensic laboratory for further testing and Swisher agreed." *Swisher*, 256 Va. at 483, 506 S.E.2d at 769.

Whether a consent to search was voluntary "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Given the fact that Swisher was not in custody at the time he consented to the search of his jacket, that he specifically had been told he was free to leave, and that the purpose of the luminol testing was fully and carefully explained to Swisher before he consented to the testing, there is no basis for reviewing the trial court's determination that his consent was voluntary.

D. Harmless error

Swisher's argument presents no compelling reason to grant certiorari because it was not properly preserved and it involves only an intensely fact-specific application of well-established Fourth Amendment law to the particular facts of Swisher's case. Even if an error had occurred, however, it unquestionably would have been harmless. The independent evidence overwhelmingly proved that Swisher committed a capital murder. He fully confessed to a friend (JA 1005-1010), he confessed again to the police (JA 173-175, 181), and Swisher's sperm was found on the victim's panties. (JA 1070). In addition, sperm found in the victim's rectum, vagina, esophagus and stomach was determined to be "consistent with a mixture of the DNA profiles of Swisher and Snyder." (JA 1067, 1068).

In view of the independent evidence against Swisher, it is clear that his guilt was established overwhelmingly and that his alleged error clearly would be harmless. Certiorari, therefore, is not warranted.

CONCLUSION

Swisher has not presented any "compelling" reasons which warrant certiorari review of his claim. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

BOBBY WAYNE SWISHER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY OF PETITIONER

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REPLY OF PETITIONER

The arguments made in Respondent's opposition brief merit a short reply. First, as shown below, Respondent's assertion that Petitioner failed to preserve his Fourth Amendment claim is both factually and legally erroneous. In fact, Respondent addressed the Fourth Amendment question of voluntariness *at length* before the Virginia Supreme Court in its Brief in opposition to the direct appeal. Second, contrary to Respondent's claims, Petitioner *has* raised an important legal, non-fact-specific issue —namely, whether a "knowing and intelligent waiver" standard should be applied to determine whether consent given by an individual in custody at a police station is voluntary under the Fourth Amendment. Finally, Respondent's harmless error argument lacks merit.

I. RESPONDENT'S CONTENTION THAT PETITIONER FAILED TO PRESERVE THE FOURTH AMENDMENT QUESTION AT ISSUE IS MERITLESS

Respondent concedes that Petitioner's pre-trial motion to suppress evidence based on violations of the Fourth and Fourteenth Amendments included "a request to suppress evidence obtained as a result of a luminol test performed on the jacket Swisher wore" to the police station (Respondent's Brief at 6 ("Resp. Br.")). Respondent further acknowledges that the trial court ruled on this motion, finding that "the search of the jacket was consensual" (Resp. Br. at 6). Moreover, Petitioner's objection to the ruling of the trial court was plainly noted in the record (Appendix C to the petition at 27a ("Pet. App.")).

Accordingly, Respondent's entire preservation argument turns on whether this point of law—that Petitioner voluntarily consented to the testing and seizure of his jacket—was preserved on direct appeal. A review of the record, however, plainly establishes that this issue has been preserved and is ripe for review by this Court.

Petitioner appealed the trial court's denial of the identical motion to suppress that Respondent readily concedes included "a request to suppress evidence obtained as a result of a luminol test performed on the jacket Swisher wore" to the police station (Pet. App. E at 29a-32a; Pet. App. F at 33a-35a). Nevertheless, Respondent contends that this appeal did not raise the same questions addressed by the trial court regarding the voluntariness of Petitioner's consent to the luminol test and seizure of the jacket (Resp. Br. at 6).

The position Respondent attempts to take before this Court, however, is contradicted by its position before

the state supreme court. There, Respondent plainly understood that Petitioner's direct appeal raised the issue of the voluntary nature of his consent, since Respondent's Brief in opposition to the appeal addressed this question of voluntariness *at length* (App. at 1a-3a).[1]

Likewise, Respondent's claim that the Virginia Supreme Court "never decided [this] issue" is clearly contradicted by that Court's opinion (Resp. Br. at 6). Finding that the trial court did not err in denying Petitioner's motion to suppress, the Virginia Supreme Court explained that:

> Swisher gave the deputies consent to test his jacket. The evidence of record supports the trial court's finding that in each instance, Swisher's consent was voluntary [(Pet. App. A at 14a)].

Accordingly, Petitioner undeniably preserved for appeal the issue of whether he voluntarily consented to the testing and seizure of his jacket under the Fourth Amendment. Of course, the fact that the state supreme court has passed upon this issue by itself permits review by this Court. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .' ").

Respondent also asserts that Petitioner did not preserve this Fourth Amendment claim because Petitioner "never alleged that his consent was unknowing and unintelligent because he allegedly was 'in custody' at the time of the consent" (Resp. Br. at 7). This "knowing and intelligent waiver" argument, however, is merely a separate argu-

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[1] "App." refers to the Appendix to this Reply.

ment in support of the same Fourth Amendment claim preserved on appeal and thus is properly before this Court.[2] *See, e.g., Lebron*, 513 U.S. at 379 ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" (quoting *Yee*, 503 U.S. at 534)); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899) ("[I]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.").

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[2] Respondent's reliance on *Yee* and *Gates* in support of the contention that Petitioner did not properly preserve the question of voluntariness is misplaced. *Yee* and *Gates*, unlike this case, involved situations where the petitioner raised a particular *claim* for the first time in a petition for certiorari. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to review a due process claim proffered by petitioners since the claim at issue was not raised or addressed below); *Illinois v. Gates*, 462 U.S. 213, 220-21 (1983) (refusing to address the issue of a modification of the exclusionary rule because the question was never raised or addressed below). In fact, another part of the *Yee* case *supports* Petitioner's position that he preserved the Fourth Amendment claim on appeal. Specifically, the *Yee* Court allowed petitioners' regulatory takings argument to proceed even though it was unclear whether the appeals court addressed this issue. *Yee*, 503 U.S. at 534-35. In so holding, the Court noted that "[p]etitioners regulatory taking argument stands in a posture different from their substantive due process claim. Petitioners unquestionably raised a taking claim in the state courts . . . . Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim . . . ." *Id.* Likewise, Petitioner's claim in this case is simply an additional argument in support of the preserved Fourth Amendment claim.

II. CONTRARY TO THE STATE'S CONTENTION, PETITIONER HAS RAISED AN IMPORTANT LEGAL, NON-FACT-SPECIFIC QUESTION

A. This Legal Question Is Properly Before This Court Because Petitioner Was In Custody At The Time The Testing And Seizure Of His Jacket Occurred

There is no dispute that Petitioner was handcuffed, brought to the police station and questioned for over two hours by three police officers without *Miranda* warnings, and that key evidence in this case—his jacket and blood-stains on his jacket—was obtained from Petitioner during this period (J.A. 455-56; Resp. Br. at 3-4, 6). Petitioner argues that in a situation like this—when a defendant is in custody at a police station—the Fourth Amendment requires the State to establish that the defendant gave a "knowing and intelligent waiver" of his right to refuse consent to search. In an earlier case, this Court explained that, under such a standard, the State would have the burden to demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The State could fulfill its burden by establishing that an individual was informed of his right to refuse consent or otherwise knew of this right before consent to search was given.

The State, however, argues that this question is not properly before this Court because Petitioner was not in custody at the time the search of the jacket occurred (Resp. Br. at 8). As noted in the petition, however, the trial court as factfinder *assumed* that Petitioner was in custody during the two hour interrogation in which the luminol blood test was performed, but found that fact to be irrelevant to Petitioner's motions to suppress (Pet. App. C at 24a, 26a-27a) ("In this case, Mr. Swisher consented to every aspect of this matter, all along. So gentlemen, there were no statements taken from him be-

tween the time that he agreed to go to the Sheriff's Department [to the time he was arrested] even if you assume at that point he was in custody.").

The Virginia Supreme Court affirmed the trial court's finding on this point (Pet. App. A at 12a).[3] Thus because the trial court assumed that Petitioner was in custody, the necessary factual predicate for the Fourth Amendment issue here is established and Respondent's argument to the contrary is without merit.

B. The State Has Not Offered Any Evidence To Establish That Petitioner Gave A "Knowing And Intelligent Waiver" Of His Fourth Amendment Rights

Respondent also argues that the petition has no merit because "it is clear that Swisher knowingly and intelligently consented to having his jacket tested" (Resp. Br. at 9). Respondent's argument misses the mark. In making this argument, Respondent relies on the following two pieces of testimony from Sergeant Lemerise: 1) Sergeant Lemerise testified that he explained the purpose of the luminol test to Petitioner and asked Petitioner whether the police could test his jacket and, in response, Petitioner replied "that's all right with me, because I don't know nothing about what you're talking about"[4] and 2) Sergeant Lemerise testified that he later told Petitioner that the luminol test was positive, asked Petitioner for permis-

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[3] Moreover, the facts plainly establish that Petitioner *was* in custody at the time the testing and seizure of his jacket occurred (Petition for Certiorari at 2-5).

[4] It appears that the State and the Virginia Supreme Court misquoted Petitioner's testimony on this point. According to the trial transcript, Petitioner's response to the Sergeant's explanation was "go ahead, I don't know anything about what you're talking about" (J.A. 456). Regardless, neither response suggests that Petitioner gave a "knowing and intelligent waiver" of his Fourth Amendment rights.

sion to further test the jacket, and received Petitioner's consent in response (*id.*).

At best, this testimony demonstrates that, after being advised that the police wanted to test the jacket for blood, Petitioner acquiesced to their wishes. It unquestionably does not establish that Petitioner was informed of his right to refuse consent or otherwise knew of this right, for purposes of a Fourth Amendment waiver. Accordingly, Respondent's argument to the contrary is without merit.

III. THE ADMISSION OF THE LUMINOL BLOOD TEST AND THE JACKET WAS NOT HARMLESS ERROR

Finally, Respondent's harmless error argument must also fail. Before a federal constitutional error can be held harmless, "the court must be able to declare a belief that it was harmless *beyond a reasonable doubt*." *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added). It is the prosecution's burden to establish that there was " '[no] reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Id.* at 24 (citation omitted). Under this governing standard, the trial court's constitutional errors in refusing to suppress the luminol blood test and jacket were plainly not harmless.

The prosecution relied heavily on the blood evidence obtained from the jacket at trial, emphasizing the victim's rare blood type and the presence of this blood type on Petitioner's jacket (J.A. 1122). The State also highlighted the presence of the blood on the arm of Petitioner's jacket, in support of the contention that the victim bled on Petitioner as he cut her throat (*id.*). No other physical evidence offered similar circumstantial support for this contention.

Significantly, according to the testimony of Sergeant Lemerise, the seizure of the jacket led to Petitioner's

arrest (J.A. 420, 461), which in turn led to the confession and the acquisition of more physical evidence from Petitioner (J.A. 931-33, 1017-1018). Moreover, this was the first piece of physical evidence taken from Petitioner that linked him to the crime, and was considered by the prosecution to be "very important" (*id.*).

Accordingly, the record clearly reflects a " 'reasonable possibility that the evidence complained of might have contributed to the conviction' " (*Chapman*, 386 U.S. at 24 (citation omitted)), and therefore the errors in admitting the luminol blood test and jacket were not harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

[Relevant Pages from Respondent's Brief to Virginia Supreme Court]

VII. THE TRIAL COURT PROPERLY DENIED SWISHER'S MOTION TO SUPPRESS EVIDENCE.

In a somewhat confusing argument, Swisher contends that the trial court erred when it denied his motion to suppress "all evidence, oral and physical, including any statements made by the Appellant whether prior to or subsequent to his arrest, and any property seized as a result of the arrest, detention or interrogation of him and any property seized by a warrantless search of the premised occupied by the Appellant, and any property or goods seized by virtue of the search warrant for his body." (Swisher's Br. at 16). The gist of Swisher's argument appears to be that any evidence gathered prior to his arrest somehow was illegally obtained and resulted in his illegal arrest, while evidence gathered after his arrest was the fruit of the supposedly unconstitutional arrest.[5] The trial judge, however, correctly found that Sheriff's deputies "had permission for every aspect of this [search]" (JA 531), and properly rejected Swisher's arguments.[6]

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[5] Any claim of an "illegal arrest" after Ridgeway informed the police of Swisher's February 22, 1997 confession is frivolous.

[6] Although Swisher contended in a written pleading filed with the trial court on July 24, 1997 that, among other things, pubic hairs, head hairs and blood were illegally obtained from his person, Swisher did not pursue this portion of his motion at the hearing held September 10, 1997, and did not obtain a ruling from the trial court on this allegation. (JA 449-533). This failure constitues a procedural default, and precludes review by this Court. Rule 5:25. It is undisputed in any event that this search was pursuant to a warrant, and Swisher does not contend that the

Whether a consent search is voluntary is a question of fact to be determined by the trial court and it's decision will be upheld on appeal unless it is clearly wrong. *Stamper v. Commonwealth*, 220 Va. 260, 268, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972 (1980). There is ample evidence to support the trial judge's conclusion that Swisher's consent was voluntarily given.

In a pretrial hearing on Swisher's motion, Augusta County Sheriff's deputies testified that on February 23, 1997, they went to the house Swisher shared with his uncles, Paul and William. They knocked on the door, asked to speak with Swisher and were admitted to the house by Paul. (JA 520-521). Paul led officers to Swisher's room and, after asking him to accompany them to the Sheriff's Department, he voluntarily did so. (JA 522). Swisher was specifically told he was not under arrest and was free to leave if he chose to do so. (JA 522-523). Before leaving the home and because it was a cold night, Swisher was asked if he wanted a jacket and deputies picked up a jacket found lying in the house for him to wear. (JA 455-456, 522). Sergeant William Lemerise testified that once at the Sheriff's Department, he noticed a few dark spots on the jacket and asked Swisher for permission to test the jacket with luminol. Swisher agreed. (JA 456). When the luminol test was positive, Lemerise asked Swisher for permission to send the jacket to the forensic laboratory for further testing and Swisher again agreed. (JA 456-457).

Later that evening, but before Swisher was arrested for Snyder's murder, officers returned to the Swisher home

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warrant was improperly issued or the search improperly conducted. *See Waye v. Commonwealth*, 219 Va. 683, 694, 251 S.E.2d 202, 209 (physical evidence, including pubic hairs, obtained from the defendant pursuant to warrant proper when unaccompanied by "brutal" or "offensive" force), *cert. denied*, 442 U.S. 924 (1979).

and asked Paul Swisher for permission to search two large "burn barrels" adjacent to the Swisher house. He agreed (JA 457) and several burned items, including burned Levi's, burned sneakers and a green shirt, were recovered from the barrels. (JA 458).

The next day, February 24, 1997, deputies asked William Swisher for permission to search the Swisher house. William was provided with a consent form and was specifically told he did not have to consent to a search. (JA 459, 483-484). William, however, agreed to the search and signed the consent form. A search ensued and a pillowcase, a towel, a bed sheet, a second pair of Levi's and a shirt were confiscated. (JA 459).

None of the items taken from the consensual search of the burned barrels or found during the February 24, 1997, consensual search of the house was admitted into evidence at Swisher's trial. Thus, there can be no error on appeal from the trial judge's refusal to suppress them.[7] Likewise, there is no error in the trial judge's refusal to suppress the jacket. Swisher, after all, voluntarily accompanied deputies to the Sheriff's Department and consented both to the luminol testing performed on his jacket and to further testing by the forensic laboratory. The mere fact that Swisher was at the Sheriff's Department when he allowed his jacket to be tested certainly did not invalidate his consent as a matter of law. *Gray*, 233 Va. at 327, 356 S.E.2d at 164. The record clearly supports the trial judge's finding that the consent was voluntarily given for each search, and Swisher's claim must fail.

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[7] Any argument by Swisher that the Augusta County Sheriff's Department search of the burn barrels provided evidence which was used to illegally arrest him must be rejected in light of Paul Swisher's express consent to search the barrels. *See also California v. Greenwood*, 486 U.S. 35, 44 (1988) (Fourth Amendment does not prohibit warrantless search and seizure of garbage left for collection).